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No. 08-389

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT C. STEINBURG,

Petitioner,

vs.

CHESTERFIELD COUNTY PLANNING COMMISSION; DANIEL A. GECKER, In His Official Capacity; SHERMAN W. LITTON, In His Official Capacity,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents, Chesterfield County Planning Commission, Sherman W. Litton and Daniel Gecker, by counsel, respectfully request the Court to deny the petition of Robert Steinburg for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 29, 2008.

SUMMARY OF CASE

The Chesterfield County Planning Commission is a public body appointed by the Chesterfield County Board of Supervisors to advise the Board on zoning matters. The Planning Commission's October 18, 2005 meeting agenda included a request to defer a public hearing on an application to amend a previously granted zoning case. The Commission took public comment on that deferral request. Steinburg spoke during that comment period, but when he repeatedly refused to address the deferral, Litton, the Chairman of the Commission, told Steinburg to leave the podium and be seated.[1] When Steinburg continued

[1] The entire comment period and Steinburg's removal are captured on the official videotape of the Commission's meeting and the proceedings have been transcribed. Both the videotape and the transcript are part of the record.

to refuse to speak to the deferral issue or be seated, he was ultimately removed from the podium.

Having viewed the videotape of the meeting, the District Court concluded that "a reasonable jury could not determine that Litton silenced Steinburg to stifle his viewpoint rather than to restore order to the meeting by focusing discussion on the deferral." The Court of Appeals likewise concluded from the videotape that "Steinburg was excluded from the public meeting because of his refusal to address the topic for which the meeting was opened and because of his disruptive manner, and not because of any viewpoint he expressed."

Throughout this litigation, both Steinburg and the county officials agreed that the following principles applied to this case:

1. Steinburg was speaking in a limited public forum which the Planning Commission had properly limited to the topic of a zoning deferral;

2. All members of the public were permitted to speak on the topic of the deferral, irrespective of their viewpoint; and

3. Any effort on the part of the Commission to prohibit any speaker from expressing a viewpoint on the subject of the limited public forum would have been impermissible under the First Amendment.

As the Court of Appeals succinctly stated:

> "In this case the parties agree that the Commission's public meeting was a 'limited public forum,' and we concur in that assessment. Accordingly, a government entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint."

(Petition for Writ of Certiorari ("Pet.") 15a). *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176, n.8 (1976).

In the face of the factual and legal simplicity of this case, Steinburg asks this Court to grant certiorari because, he claims, First Amendment law is "unsettled." At various times in his Petition, Steinburg asserts that issues exist in this case about whether a limited public forum is distinct from a designated public forum, whether it is a type of public forum or a type of non-public forum, what level of scrutiny is appropriate to determine the constitutional reasonableness of the limitations imposed on the forum and what level of scrutiny is appropriate to judge content-based restrictions on speech. Whether the federal courts, in reality are, as Steinburg contends, "dazed and confused" on these questions is irrelevant to this appeal. These hypothetical questions have nothing

to do with this case and were never raised by Steinburg below.[2] These questions might be relevant in cases outside the public meeting context where a limited public forum is opened for general public speech and certain topics are then excluded from discussion by the government.[3] However, they have no relevance in public meetings with fixed agendas limited to specific topics. This Court decided more than 30 years ago that limitations of the forum to a

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[2] Even the "dazed and confused" quote which appears in a Dickinson College law review comment is misused in Steinburg's Petition. "Dazed and confused" is used by the student author to discuss whether or not the "limited public forum" and "designated public forum" middle ground between traditional public fora and non-public fora consist of a single category or two separate ones. "Despite the acceptance of a middle ground between the traditional public forum and the nonpublic forum, the courts have become hopelessly 'dazed and confused' over whether this middle ground consists of one or two categories, and, if the latter, how they relate to one another." *See* 107 Dick. L. Rev. 639, 657 (2003). Since the parties agreed, from the inception of this case, that Steinburg was speaking in a "limited public forum" for the discussion of a zoning deferral only, no one has been "dazed" about the nature of the forum in which Steinburg spoke or "confused" about the constitutional standards that apply to restricting speech within that forum.

[3] *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985) (politically active groups excluded from participating in government employees charity drive); *Rosenberger v. Rector and Board of Visitors of the University of Virginia*, 515 U.S. 819 (1995) (religious groups excluded from receiving University's student fees available to all other student groups); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (religious club denied access to school facilities that were available to all other clubs).

single topic of public business is *per se* permissible. *City of Madison, supra.*

STATEMENT OF FACTS

Chesterfield County, Virginia is a political subdivision of the Commonwealth of Virginia located immediately south of the City of Richmond. The County is composed of 446 square miles and has a population of approximately 310,000. The County is governed by a five-member Board of Supervisors elected to four-year terms. The Chesterfield County Planning Commission is a public body appointed by the Board of Supervisors to give the Board advice on land use matters. The Commission considers zoning matters for which public comment is permitted including requests by zoning applicants to defer to a later date scheduled public hearings on zoning applications. (A. 53, 71).

When the Planning Commission held a regular monthly meeting on October 18, 2005, one of the items on its agenda was a request to defer for 30 days the public hearing on a rezoning application for a residential development known as "Tarrington". (Court of Appeals Appendix ("A.") 69-79). The application sought to amend a zoning condition to allow garages in Tarrington to face toward the street rather than to the side. (A. 75). The Chairman of the Commission, Sherman Litton, invited members of the public to speak on the issue of whether or not the

deferral request should be granted. (A. 80 (Videotape); A. 81). The videotape and a verbatim transcript are part of the record and are undisputed. (A. 80 (Videotape), Petition ("Pet.") 6a-11a).

The first speaker expressed support for the deferral throughout her presentation while including comments about mine safety issues as well. (Pet. 31a). (Tarrington is located in the vicinity of historic coal mines) The second speaker also expressed support for the deferral but also addressed mine safety. (Pet. 31a-32c). During his comments the second speaker was twice prompted to address the deferral and both times he did so. (Pet. 31a-32a).

Steinburg spoke third. Steinburg spoke for more than a minute and one-half without ever mentioning the deferral request. (Pet. 6a-7a). Steinburg then directed a comment to Commissioner Gecker, complaining that Gecker had been talking during the comment period to another Commission member (Pet. 7a).[4] Gecker informed Steinburg that he was "not going to listen to what you have got to say on a deferral motion when you come up and speak to something other than the deferral." (Pet. 8a). Rather than speak

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[4] During a prior speaker's comments Gecker had spoken with a fellow Commission member, Russ Gulley, who was sick and wanted to leave the meeting room. Gulley had asked Gecker (who was more familiar with the Tarrington case than Gulley since the property at issue was located in Gecker's district) whether he (Gulley) needed to stay and listen to the discussion on the deferral or whether he could leave. (A. 584).

to the deferral when prompted to do so, as the prior speaker had done, Steinburg shouted, "Mr. Gecker would you please give me the right to speak, who do you think you are?" (Pet. 8a).[5] Litton, as Chairman, then intervened:

> CHAIRMAN LITTON: I'm going to cut you off.[6] I'm Chairman, I can cut –
>
> STEINBURG: Mr. Litton, yes you can, you can do that.
>
> CHAIRMAN LITTON: And I am. This has gone way past. I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down. (Pet. 8a).

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[5] Contrary to Steinburg's contention that Gecker's comment "chilled and intimidated" his "speech" and was "the equivalent of telling him to stop speaking" (Pet. 36-7), Steinburg continued to speak (and, at times, to shout) for well over a minute thereafter. He resolutely refused, however, to speak to the only topic which was before the limited forum. (Pet. 9a-10a).

[6] Steinburg conveniently terminates the verbatim transcript at this point in his Petition with an ellipsis: "I'm going to cut it [sic] off . . . " (Pet. 8). Steinburg eliminates the rest of the transcript in order to hide the fact that Litton's explanation is consistent with the constitutional standards applicable to confining speech to the topic being considered in a limited public forum. *City of Madison*, 429 U.S. at 176, n.8. In the portion of the transcript omitted by Steinburg, Litton explains that he cut off Steinburg because "[t]his is nothing but a deferral. This has nothing to do with the case," and "[b]ecause it's strictly a deferral, and we're not arguing the case tonight." (Pet. 8a-9a).

Steinburg responded, "I am *not* sitting down. I am not done talking yet." Litton responded that he had "heard enough on this case tonight" and was going to cut off Steinburg's comments. (Pet. 8a-9a).

Steinburg then asked Litton, "Can you tell me why you are cutting it off?" Litton reiterated: "Because it is strictly a deferral and we're not arguing the case tonight, the case will be discussed at some time, at a later time." Litton then made one last attempt to get Steinburg to speak to the deferral: "If you are telling me that you are in favor of the deferral that is all I need to know. If you don't want the deferral, then you can argue . . . " (Pet. 9a). Steinburg once again interrupted Litton at this point saying, "You don't want any background information on anything." But even after this third attempt by Litton to get Steinburg to speak to the deferral Steinburg still would not tell the Commission whether he supported or opposed the deferral. (A. 80 (Videotape), Pet. 9a-10a).

When it became apparent to Litton that Steinburg would not address the deferral, Litton told Steinburg, "I am asking you just to sit down, please."[7]

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[7] Litton's deposition testimony confirmed his contemporaneous explanation to Steinburg at the October 18 meeting that he asked Steinburg to be seated only because Steinburg would not discuss the deferral: "I had give [sic] him several minutes there to speak, and in no words did he talk about the deferral." (A. 465). Litton further testified that he "[l]et him go for several minutes without him mentioning the word deferral in any way or anyhow, hoping he would get to a word 'deferral' saying something like the other ones did." (A. 466). "He [Steinburg] had

(Continued on following page)

Steinburg responded: "I know you are. I understand what you are doing. And when I am through speaking, I will sit down." In response, Litton told Steinburg, "No, I think you are going to sit down now." When Steinburg responded, "I am not," Litton requested the assistance of a Chesterfield County police officer in removing Steinburg from the podium because he would neither speak to the matter before the Planning Commission nor sit down. (Pet. 9a-10a).

MATERIAL PROCEEDINGS

Steinburg filed his Complaint in the District Court on April 12, 2006. On May 31, 2006, the Commission, Litton and Gecker filed a Motion for Summary Judgment. Recognizing the conclusive nature of the videotape, Steinburg also filed a Cross-motion for Partial Summary Judgment on May 31, 2006. The District Court then permitted Steinburg to conduct discovery. At the conclusion of discovery Steinburg moved to add the police officer who removed him from the Commission meeting as a defendant and to add Litton and Gecker as defendants in their individual capacities.[8]

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been up for I don't know how long, three or four minutes, and hadn't discussed the deferral in no way." (A. 467). "The only objectionable object [sic] was that he hadn't discussed the deferral in any way." (A. 469).

[8] Up to that time, Litton and Gecker had been sued in their official capacity only.

The District Court found that the videotape established that Steinburg was removed from the podium for failing to address the topic of the public hearing, not because of any viewpoint which he had expressed during the meeting. Accordingly, the District Court granted summary judgment to the Commission and to Litton and Gecker in their official capacity. The District Court also denied Steinburg's motion to add the police officer as a defendant and to add Litton and Gecker as defendants in their individual capacity since the Court's finding that Steinburg was not subjected to viewpoint discrimination rendered Steinburg's claims against the additional parties futile.

Steinburg appealed the District Court's rulings to the United States Court of Appeals for the Fourth Circuit. On May 29, 2008, the Court of Appeals issued its opinion affirming the judgment of the District Court. Steinburg then sought a rehearing en banc. The rehearing petition was circulated to all Judges of the Fourth Circuit. None of the Judges even requested that a poll be taken to determine whether any Judge thought that a rehearing was appropriate. Accordingly, the Court of Appeals denied the rehearing request.

Steinburg then filed this Petition.

LEGAL ARGUMENT

The videotape of the October 18, 2005 Planning Commission meeting shows that Litton terminated Steinburg's participation in the public comment period only after Steinburg repeatedly rejected Litton's invitation to speak to the deferral. The District Court found that the videotape conclusively established that Steinburg was not removed from the podium because of improper viewpoint discrimination. He was removed because he disrupted the Planning Commission meeting when he refused to address the only topic of the public hearing: whether or not to defer the zoning case:

> " . . . in light of all the possible inferences that could be drawn from Litton's conduct, the Court concludes that a reasonable jury could not determine that Litton silenced Steinburg to stifle his viewpoint rather than to restore order to the meeting by focusing discussion on the deferral."

(Pet. 70a-71a).

The Court of Appeals affirmed the District Court's ruling, holding that:

> "We agree with the district court that Steinburg was excluded from the public meeting because of his refusal to address the topic for which the meeting was opened and because of his disruptive manner, and not because of any viewpoint he expressed."

(Pet. 3a).

In his Petition, Steinburg skirts the express factual holdings of both the District Court and the Court of Appeals that Steinburg was not subjected to either a content-based restriction or viewpoint discrimination. Steinburg's attempt to couch this appeal as an effort to resolve a conflict between the federal circuit courts on the standard for reviewing governmental viewpoint discrimination is misguided because any such "conflict" is unrelated to his own case. His appeal is instead nothing more than an attempt to appeal the factual determination of two lower courts; that no viewpoint discrimination occurred. The rules of this Court expressly provide that appeals in such cases are "rarely granted." Rule 10, Rules of the Supreme Court.[9]

The irrelevance of Steinburg's "legal conflict" claim is underlined by his discussion of the standard

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[9] Steinburg's attempt to resurrect a facial challenge to the "personal attacks" policy is also misplaced. The facial challenge was rendered moot when the policy was repealed by the Commission while this case was pending before the District Court and accordingly, the District Court made no decision concerning the facial validity of the policy. (Pet. 46a, n.6). Moreover, since both the District Court and Court of Appeals found that there was no evidence that Chairman Litton invoked the policy when he asked Steinburg to be seated, an "as applied" challenge to the policy was also unavailable. (Pet. 23a, 43a). The Court of Appeals discussed the policy and found it to be content-neutral and not facially unconstitutional but ultimately concluded that the policy was not relevant to this case, agreeing with the District Court that the "evidence is insufficient to prove that Steinburg was silenced because of the policy." (Pet. 23a).

of review in *Good News Club*, *Cornelius*, and *Rosenberger*, *supra*. (Pet. 23). Those three cases each dealt with the issue of the standard of review for determining when it is constitutionally permissible to exclude, because of the content of their speech, individuals or groups who would otherwise be within the class of speakers permitted in a limited public forum. That standard of review is irrelevant where, as here, no viewpoint discrimination occurred in the first place and the speaker was excluded from the forum solely because he failed to address the specific topic for which the forum had been opened.

The issue of the standard of review for content-based restrictions imposed by government is also an inappropriate issue for appeal in this case for procedural reasons. Steinburg has never previously raised it in this litigation and, therefore, cannot raise it now. *Walters v. City of St. Louis*, 347 U.S. 231, 233 (1954) (the Court "will not undertake to review what the court below did not decide"). On page 10 of his Petition Steinburg contends that he raised the issues he raises now on page 32 of his Opening Brief to the Court of Appeals. However, a review of page 32 of his Opening Brief proves that his claim is inaccurate. On page 32, Steinburg argued about the standard of review only:

> If the government excludes a speaker who falls within the class to which a limited or designated public forum is made generally available . . .

The District Court found in this case that Steinburg did not fall within the class to which the limited public forum was generally available. That finding, which was affirmed by the Court of Appeals, makes a determination of the proper standard of review irrelevant in this case.[10]

Even Steinburg to this point has never disputed that "[p]lainly, public bodies may confine their meeting to a specified subject matter." *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176 n.8 (1976). As Steinburg stated on p. 31 of his Opening Brief to the Court of Appeals:

> "When a state establishes a limited public forum, as in this case, the state is not required to and does not allow persons to engage in every type of speech and may be justified in reserving its forum for certain groups or for the discussion of certain topics, *but the restriction must not discriminate against speech on the basis of content or viewpoint*, and must be reasonable in light of the purpose served by the forum." (emphasis in original).

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[10] The irrelevance of Steinburg's "standard of review" argument is confirmed by the fact that the passage cited by Steinburg from page 32 of his Opening Brief to the Court of Appeals was not part of any claim concerning what "standard of review" to apply but, instead, was part of his now twice-rejected claim that there are "material" factual disputes as to whether Steinburg had been subjected to viewpoint discrimination.

See also Steinburg's Opening Brief to the Court of Appeals at pp. 24-25:

> "The First Amendment allows the public body to adopt and enforce procedures that limit public comments to specific topics within the public body's jurisdiction or which are before the public body at the time the public speaks. . . . Content-related regulation is constitutionally appropriate in a limited public forum if the limitations placed on content fall within the scope of the designation, and if the regulation is neutral as to viewpoint within the subject matter of the content."

The Rutherford Institute, who is co-counsel for Steinburg in this appeal, has likewise recognized that the law prohibiting viewpoint discrimination is settled and beyond legitimate dispute: "[I]t is fundamental First Amendment jurisprudence that there can be no viewpoint discrimination." (citing *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983), *Rosenberger*, and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), Petition for Writ of Certiorari filed in *Lee v. York County School Division*, No. 07-140 (2007 WL2261604 (U.S.) at 18 (July 31, 2007)). "Viewpoint discrimination is clearly a violation of the First Amendment when it occurs in a public forum." Petition for Writ of Certiorari filed in *Bannon v. School District of Palm Beach County*, No. 04-1207 (2005 WL562199 (U.S.) at 11 (March 7, 2005)).

While subject matter restrictions such as the ones imposed in *Cornelius*, *Rosenberger*, and *Good News* must be scrutinized under some standard of review, they are per se permissible in the context of public meetings called to discuss specific topics of public business, pursuant to this Court's ruling in *City of Madison*. The only standard of review necessary is the standard which both the District Court and Court of Appeals applied in this case: to determine whether an individual speaker was excluded from the forum for failing to address the topic of the public hearing, which is constitutionally permissible, or whether the speaker was excluded because of the viewpoint he was expressing on the topic of the public hearing, which is not constitutionally permissible. *City of Madison* at 176. Both parties to this litigation recognized that this was the standard of review in this case. No federal court has held otherwise. *See, e.g., Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004); *Smith v. Cleburn County Hosp.*, 870 F.2d 1375, 1383 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989); *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989).

CONCLUSION

In the two and one-half years that this case has been pending, three facts have remained constant: (1) no party has disputed that Steinburg was speaking in a limited public forum; (2) both parties have agreed that the First Amendment prohibits content-based or

viewpoint discrimination against a speaker in a limited public forum; and (3) neither party has maintained, briefed or argued that the law governing this case is unsettled, conflicting or even confusing.

The facts in this case are on videotape. The tape shows a speaker who refuses to discuss the 30-day deferral which was the only topic of the public forum, and who is removed from the public hearing only after he refuses legitimate requests that he discuss the deferral. This case has nothing to do with the "conflict" which Steinburg asserts has left the courts "dazed and confused." Whether this "conflict" is real or illusory is immaterial to this case and, therefore, this case is not an appropriate vehicle to engage in such an academic discussion.

Respectfully submitted,

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